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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA
6

7 UNITED STATES OF AMERICA,
8
9 v.
10 EDWARD SMITH,
11 Defendant.

Case No. 3:15-cr-00061-HDM-WGC
3:21-cv-00248-HDM

ORDER

12 Before the court is a motion to vacate, set aside, or
13 correct sentence pursuant to 28 U.S.C. § 2255 filed by defendant
14 Edward Smith (ECF No. 935). The government has responded (ECF
15 No. 942), and Smith has replied (ECF No. 945).

16 **I. Factual and Procedural Background**

17 On August 5, 2015, Smith and nine other co-defendants were
18 charged by way of indictment with a large drug distribution
19 conspiracy and other related crimes. (ECF No. 1). Smith's
20 charges stemmed from his orchestration, while incarcerated at
21 Northern Nevada Correction Center, of several drug transactions
22 outside the institution between co-defendant Andres Rodriguez
23 and Roberto Contreras Lopez, a confidential informant for the
24 Drug Enforcement Administration. Smith's charges included one
25 count of conspiracy to possess with intent to distribute, three
26 counts of methamphetamine distribution, one count of money
27 laundering and one count of illegal use of a communication
28 facility. (*Id.*) The indictment was superseded for a second time

1 on March 9, 2016. On February 28, 2018, a third superseding
2 indictment was returned against Smith only, adding one more
3 count of methamphetamine distribution.

4 All of Smith's co-defendants pleaded guilty while Smith
5 proceeded to trial. At trial, the government presented evidence
6 that Smith directed co-defendant Andres Rodriguez to sell
7 various amounts of methamphetamine on three occasions to a man
8 named Javier, whose contact information Smith had secured from
9 another inmate. Javier was, unknown to either Smith or
10 Rodriguez, a confidential informant cooperating with the Drug
11 Enforcement Agency. Smith also asked Rodriguez to give \$1,000.00
12 to a correctional officer who agreed to smuggle drugs into
13 Smith's prison. Smith arranged for a wire transfer of \$1,500.00
14 to pay for the drugs and to cover the correctional officer's
15 payment. Marisella Rivera, the girlfriend of another prison
16 inmate, Jorge Murillo, conducted the wire transfer, and
17 Rodriguez collected the funds per Smith's instruction. The
18 evidence included several phone calls from Smith to Rodriguez
19 and one from Smith to Lopez Contreras, as well as conversations
20 between Rodriguez and Lopez Contreras and the testimony of
21 Rodriguez, Lopez Contreras, and DEA Agent Blaine Beard. Smith
22 did not testify.

23 After the government's evidence, Smith's attorney moved for
24 Rule 29 dismissal. Counsel argued, in part, that the government
25 had not met its burden to prove that the phone calls were made
26 by Smith. (ECF No. 832 (Tr. 324)). The motion, which was made
27 and argued outside the presence of the jury, was denied. (*Id.* at
28

1 325). Smith at that point opted not to testify, a decision about
2 which he was canvassed. (*Id.* at 326-27).

3 During closing argument, defense counsel stated:

4 I will, from the outset, concede . . . that the
5 government has proven that Andres Rodriguez was
6 involved in a massive drug operation, and that Andres
7 Rodriguez was involved with somebody inside the prison
as part of his operation. What the government has not
established is that it was Mr. Smith involved.

8 (*Id.* at 409). He argued that Lopez Contreras had never met Smith
9 so could not identify him as the speaker on the phone calls and
10 that Rodriguez, who was the only person who had identified
11 Smith, was not trustworthy and had significant incentive to
12 falsely pin the blame on Smith. Counsel also argued:

13 You may have 50 reasons that you think, ah, Mr. Smith
14 probably did it. I think he probably did it. Fifty of
15 them. But, if you have one reasonable doubt that the
16 government has not established that it was Mr. Smith
making those phone calls, then it is your duty to find
him not guilty under the requirements of this Court
and the law.

17 (*Id.* at 426).

18 Following deliberations, the jury found Smith guilty on all
19 counts. He was later sentenced to 235 months in prison.
20 Following a direct appeal, in which Smith raised, among other
21 things, a sufficiency of the evidence claim as to his money
22 laundering conviction, Smith filed the instant § 2255 motion.

23 **II. Standard**

24 Pursuant to 28 U.S.C. § 2255, a federal inmate may move to
25 vacate, set aside, or correct his sentence if: (1) the sentence
26 was imposed in violation of the Constitution or laws of the
27 United States; (2) the court was without jurisdiction to impose
28 the sentence; (3) the sentence was in excess of the maximum

1 authorized by law; or (4) the sentence is otherwise subject to
2 collateral attack. *Id.* § 2255(a).

3 Smith primarily asserts claims of ineffective assistance of
4 counsel. Ineffective assistance of counsel claims are governed
5 by *Strickland v. Washington*, 466 U.S. 668 (1984). Under
6 *Strickland*, a petitioner must satisfy two prongs to obtain
7 habeas relief—deficient performance by counsel and prejudice.
8 466 U.S. at 687. With respect to the performance prong, a
9 petitioner must carry the burden of demonstrating that his
10 counsel's performance was so deficient that it fell below an
11 "objective standard of reasonableness." *Id.* at 688. "'Judicial
12 scrutiny of counsel's performance must be highly deferential,'
13 and 'a court must indulge a strong presumption that counsel's
14 conduct falls within the wide range of reasonable professional
15 assistance.'" *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009)
16 (citation omitted). In assessing prejudice, the court "must ask
17 if the defendant has met the burden of showing that the decision
18 reached would reasonably likely have been different absent
19 [counsel's] errors." *Strickland*, 466 U.S. at 696.

20 **III. Analysis**

21 **A. Grounds One and Four**

22 In his first and fourth grounds for relief, Smith asserts
23 that counsel was ineffective for failing to challenge the phone
24 calls that were introduced at trial. (Tr. Exs. 1-8 & 21).
25 Specifically, Smith argues that the "talk time" for each of
26 these calls listed in the Nevada Department of Corrections'
27 official call log does not match the call duration for the calls
28 identified in the government exhibits. He therefore appears to

1 suggest that the phone calls have been tampered with or are not
2 otherwise authentic. Ground One asserts that Smith's attorneys
3 were ineffective for failing to investigate and notice the
4 discrepancies, and Ground Four asserts that Smith's attorneys
5 were ineffective for failing to object to introduction of the
6 calls due to the discrepancies. The claims are closely aligned
7 and therefore properly considered together.

8 Smith can demonstrate neither deficient performance nor
9 prejudice. It is evident, when comparing the recordings of the
10 phone calls to the NDOC call log, that the "talk time" included
11 only the time after the preliminary instructions concluded and
12 the inmate was directed to begin speaking. The government's
13 listed times, by contrast, reflected the entire length of the
14 recording, including the preliminary instructions. The court has
15 compared each recording to the times listed in the call log and
16 the government's exhibits and each corresponds exactly in this
17 manner. There being no discrepancy, counsel were neither
18 deficient nor caused Smith prejudice by failing to raise the
19 issue. Smith is thus not entitled to relief on either Ground One
20 or Ground Four.

21 B. Grounds Two and Thirteen

22 In Ground Two, Smith alleges that his attorneys were
23 ineffective for not investigating (1) Randy Ponciano; and (2)
24 Robert Lopez Contreras. As to Lopez Contreras, Smith asserts,
25 counsel should have discovered various discrepancies and raised
26 them as a basis for excluding his testimony. In Ground Thirteen,
27 Smith asserts that the government committed prosecutorial
28 misconduct by allowing Lopez Contreras, an alleged impostor, to

1 testify. The court will consider Grounds Two and Thirteen
2 together as they significantly overlap.

3 i. Ponciano

4 Ponciano was a "source of information" in the investigation
5 into Smith's criminal conduct. Smith asserts that he asked his
6 attorneys to obtain copies of Ponciano's phone calls from
7 prison, Ponciano's arrest and prison records, and Ponciano's
8 statement to the DEA. But Smith does not explain what any of
9 this information would have shown or how it would have led to a
10 reasonable likelihood of a different result in his case. He has
11 not therefore demonstrated either prejudice or deficient
12 performance in this respect.

13 ii. Lopez Contreras

14 Smith asserts that the man who testified on the stand as
15 Lopez Contreras was not actually Lopez Contreras, pointing to
16 several indications of his alleged falsity: (1) the dates of
17 Lopez Contreras' confidential source contract produced during
18 discovery is for a time period following his involvement in this
19 case; (2) Lopez Contreras testified that he had received about
20 \$33,000 in compensation over his 16 years of cooperating but if
21 he had cooperated as frequently as he testified and received
22 even a fraction of what he did in this case, he would have
23 earned in excess of \$90,000; (3) Lopez Contreras could not have
24 worked at Damonte Ranch since 2003 as he testified because
25 Damonte Ranch was a community development, not a ranch, and it
26 did not exist in 2003, and at any rate Lopez Contreras would
27 never have been hired with his criminal history; (4) Lopez
28 Contreras testified that his phone calls with Smith were in

1 Spanish when Smith does not speak Spanish; (5) the witness who
2 testified did not resemble a photo of Lopez Contreras shown at
3 trial; (6) Beard testified that Lopez Contreras had been
4 arrested on a meth charge in 2010 but no such charge appears on
5 his rap sheet; (7) his rap sheet shows Lopez Contreras had been
6 arrested and removed from the country several times, including
7 in Bakersfield, California in 2006, which contradicts his claim
8 he'd worked at Damonte Ranch since 2003; and (8) the government
9 represented that there was no evidence of Lopez Contreras'
10 dishonesty or history of substance abuse problems when actually
11 Lopez Contreras had been arrested for meth in 2010 and there was
12 evidence of substance abuse in his rap sheet. (ECF No. 935 at
13 10-11; 52-55).

14 None of Smith's arguments or purported facts, alone or in
15 combination, establishes that the witness who testified was not
16 in fact Lopez Contreras. Preliminarily, Smith does not provide
17 any of the discovery on which he bases his arguments, making it
18 impossible for the court to properly evaluate several components
19 of his claim. At any rate, even if Smith has accurately
20 represented the contents of the discovery, none of the evidence
21 or testimony he cites seriously calls into question the identity
22 of the witness who testified such that counsel was ineffective,
23 or the government committed misconduct, with respect to that
24 witness. Lopez Contreras cooperated with the DEA for many years,
25 including before and after the time of the events in this case,
26 so the presence in discovery of a cooperation contract for a
27 time after Smith's criminal acts proves little. Smith's
28 speculation as to how much money Lopez Contreras should have

1 received over the course of 16 years is not evidence. What is
2 also pure speculation is Smith's assertion that Lopez Contreras
3 could not have found work with his rap sheet. Nor has Smith
4 established that Damonte Ranch was solely a planned residential
5 community and not a ranch on which Lopez Contreras could have
6 worked.¹ The court did not understand Lopez Contreras' testimony
7 to be that the phone call with Smith was in Spanish, and
8 regardless, the jury could hear for itself that it was not in
9 Spanish. (See ECF No. 830 (Tr. 50-51)). Changes in physical
10 appearance can and do take place over time, and the appearance
11 of one's skin can also vary depending on sun exposure and
12 photographic lighting. Lopez Contreras' arrest in California and
13 removal from the country in 2006 is not inconsistent with his
14 working at Damonte Ranch since 2003, particularly as he
15 testified that in at least one year he worked at the ranch for
16 less than the full year, (see *id.* at 71), and the dates of Lopez
17 Contreras' removals quoted by Smith in his motion reflect
18 repeated reentries into the country, sometimes within weeks of
19 each other. Finally, even assuming the rap sheet erroneously
20 omitted a 2010 charge or arrest and even assuming the government
21 incorrectly represented that there was no evidence of dishonesty
22 or substance abuse, the court is not persuaded that either
23 factor leads to an inexorable -- or even probable -- conclusion
24 that the trial witness was not who he said he was, and Smith has
25 not otherwise established how such information, or lack thereof,

26
27 ¹ Internet research suggests that in fact Damonte Ranch was, in
28 the relevant time period, both a residential community and a
working ranch. See https://en.wikipedia.org/wiki/Damonte_Ranch
(last accessed May 18, 2022).

1 caused him prejudice sufficient to support either an ineffective
2 assistance of counsel claim or a claim of prosecutorial
3 misconduct.

4 As such, even if counsel were deficient for failing to
5 raise these various issues with the court, there is no
6 reasonable likelihood that the court would have excluded Lopez
7 Contreras' testimony even if they had. Smith has not therefore
8 established ineffective assistance of counsel and is not
9 entitled to relief on Ground Two of the motion.

10 For the same reasons, Smith has not established that the
11 prosecutor committed misconduct. "Due process protects
12 defendants against the knowing use of any false evidence by the
13 State, whether it be by document, testimony, or any other form
14 of admissible evidence." *Hayes v. Brown*, 399 F.3d 972, 981 (9th
15 Cir. 2005). Smith has not established that Lopez Contreras'
16 testimony was false. Accordingly, Ground Thirteen is likewise
17 without merit.

18 **C. Grounds Three and Six**

19 Smith asserts that the \$1,500.00 wire transfer did not
20 relate to drug dealing but actually was for pornography and
21 stamps, the former of which is contraband in the prison. Smith
22 asserts that Jorge Murillo was willing to testify as much and
23 that proper investigation from his counsel would have revealed
24 that pornography from Rodriguez's phone matched most of the
25 phone calls between Smith and Rodriguez. In Grounds Three and
26 Six, Smith asserts his attorneys were ineffective for failing to
27 investigate these assertions or present evidence supporting it
28 to the jury, including the testimony of Murillo. He asserts that

1 if these facts had been presented, he would not have been
2 convicted.

3 The government argues that Smith has provided no affidavit
4 or admissible evidence of what Murillo would have testified to,
5 but that even if he had, such evidence would have to be weighed
6 in the context of the other very strong evidence at trial,
7 including Smith's thinly disguised phone calls with Rodriguez.
8 Smith replies that his claim is supported by his own letters to
9 his attorneys and his statements to the court before trial.

10 Smith's statements to the court before trial were not
11 specific to Murillo; he stated only that counsel had not
12 subpoenaed any of thirteen witnesses he asked for. (ECF No. 830
13 (Tr. 17-18)). Further, Smith's own letters, even if they had
14 been produced, would be self-serving and unreliable evidence.
15 Most importantly, Smith provides nothing from Murillo indicating
16 that he had been willing to testify or what he would have
17 testified to. Absent such evidence, Smith cannot establish
18 either that counsel was deficient or that his conduct prejudiced
19 Smith.

20 But finally, and most importantly, it is not reasonably
21 likely that a jury would have acquitted Smith on any count had
22 counsel investigated and/or Murillo testified as Smith claims he
23 would have. Whether prejudice resulted from "a duty to
24 investigate must be considered in light of the strength of the
25 government's case." See *Rios v. Rocha*, 299 F.3d 796, 809 (9th
26 Cir. 2002) (citation omitted)). The government's case was
27 strong, and that Rodriguez, and thus Smith, were dealing drugs
28 was supported not only by Rodriguez's own testimony and the

1 barely concealed conversations between Rodriguez and Smith, but
2 also by recordings between the confidential informant and
3 Rodriguez, which clearly involved drug dealing. Smith's claim
4 that the \$1,500.00 transfer was for pornography and stamps was
5 in this context implausible and not likely to be believed by a
6 reasonable jury.

7 Accordingly, Smith has not shown he is entitled to relief
8 on Ground Three or Ground Six of the petition.

9 **D. Ground Five**

10 In his fifth ground for relief, Smith alleges that counsel
11 rendered ineffective assistance by failing to renew his Rule 29
12 motion at the close of the defense, by not articulating the
13 original motion count by count, and by not asking the court to
14 explain its ruling. Smith argues that had his attorney rendered
15 effective assistance, the court would have seen there was no
16 evidence of money laundering. Finally, he argues that the Ninth
17 Circuit denied review because the motion was not renewed.

18 The government argues that this claim is not reviewable on
19 a § 2255 motion because it was raised on direct appeal. It
20 further argues that to the extent the claim is reviewable, Smith
21 cannot show prejudice.

22 As a preliminary matter, Smith raised on direct appeal the
23 underlying claim on which his ineffective assistance of counsel
24 claim is based, not the ineffective assistance of counsel claim
25 itself. It is not therefore procedurally barred.

26 The court agrees, however, that Smith cannot demonstrate
27 prejudice. The Ninth Circuit considered, and rejected, Smith's
28 sufficiency-of-the-evidence claim as to his money laundering

1 conviction.² While the court applied the plain error standard to
2 the unpreserved claim, (ECF No. 924 at 2-3), Smith has not
3 established a reasonable likelihood that the Ninth Circuit would
4 have ruled otherwise had it applied *de novo* review. See *United*
5 *States v. Magallon-Jimenez*, 219 F.3d 1109, 1112 (9th Cir. 2000)
6 (noting that the appellate court reviews denial of a Rule 29
7 motion based on insufficient evidence *de novo*).

8 Sufficiency of the evidence is a low standard to begin
9 with, making it difficult to conceive a different result even
10 under *de novo* review. See *United States v. Vizcarra-Martinez*, 66
11 F.3d 1006, 1010 (9th Cir. 1995) (“[I]t is difficult to imagine
12 just what consequences flow from our application of the two
13 different standards or to envision a case in which the result
14 would be different because of the application of one rather than
15 the other of the standards.”); *Mahon v. United States*, 2018 WL
16 8188212, at *59 (D. Ariz. Nov. 5, 2018), *report and*
17 *recommendation adopted*, 2019 WL 1556147 (D. Ariz. Apr. 10, 2019)
18 (“In substance, however, the courts have struggled to define a
19 practical effect to the higher ‘plain error’ standard, in light
20 of the already exacting standard for claims of insufficient
21 evidence.”). This is particularly so in view of the virtually
22 incontrovertible evidence of Smith’s guilt introduced at trial.
23 That evidence included several recorded phone calls during which
24 Smith gave Rodriguez a series of numbers that would allow him to
25 collect “15” from MoneyGram or Western Union, sent from Los
26 Angeles by Marisella Rivera, (Tr. Exs. 6A-8B), and several

27 ² Smith raised no other sufficiency of the evidence claim on
28 appeal and Smith’s Rule 29 claim applied only to the money
laundering claim.

1 conversations in which Smith directed Rodriguez to sell Lopez
2 Contreras drugs. As previously discussed, Smith's contention
3 that the wire transfer was for pornography and postage stamps is
4 implausible when considering all the evidence introduced at
5 trial.

6 For the same reason, counsel's failure to preserve the
7 motion, to address the motion count-by-count, or to require the
8 court to explain its ruling was not deficient performance and
9 did not cause Smith prejudice.

10 Smith is not entitled to relief on Ground Five of the
11 motion.

12 **E. Ground Seven**

13 In Ground Seven, Smith asserts his attorney was ineffective
14 for failing to call witnesses in his favor who would have
15 testified that the only thing Smith sold in his institution was
16 porn, stamps and other store items.

17 Smith asserts that counsel should have called Jorge
18 Murillo. For the reasons explained *supra*, Smith has failed to
19 substantiate what Murillo's testimony would have been and
20 therefore has not established a reasonable probability of a
21 different outcome had Murillo been called.

22 Smith also references thirteen witnesses he asked to be
23 called but who were not. There is no evidence as to what any
24 witness would have testified, nor is it even clear which
25 thirteen witnesses Smith alleges should have been called. Smith
26 therefore has failed to substantiate his claim with respect to
27 any of the other witnesses he asserts should have been called.

28

1 Smith has failed to establish that he is entitled to relief
2 on Ground Seven of the motion.

3 **F. Ground Eight**

4 In Ground Eight, Smith asserts that counsel was ineffective
5 because he denied Smith his right to testify on his own behalf.

6 While Smith waived his right to testify after a canvass by
7 the court, he argues that he was forced into that decision
8 because counsel chose to dispute that it was Smith on the phone
9 calls when in fact Smith wanted to admit that he made the calls.
10 Counsel also failed to provide Smith with a list of questions he
11 would ask if Smith testified, further deterring Smith from
12 exercising his constitutional right to testify.³

13 Counsel disputed that it was Smith on the calls twice: once
14 during the Rule 29 motion at the close of the government's case
15 and once during closing arguments. The first time was outside
16 the presence of the jury and the second time was after Smith had
17 already waived his right to testify. In neither case could
18 counsel's strategic decision reasonably have affected Smith's
19 decision to testify. Smith therefore has not established
20 prejudice.

21 The assertion that Smith could not testify because counsel
22 failed to provide him with questions in advance is conclusory
23 and also fails to establish any prejudice.

24
25
26 ³ In reply, for the first time, Smith argues that counsel's
27 questions to witnesses - specifically, asking them whether they
28 knew Smith made the phone calls - also precluded him from
testifying. The court will not consider this argument raised for
the first time in the reply.

1 Finally, counsel made the strategic decision to defend
2 Smith by casting doubt on whether it was Smith on the phone
3 calls. This was a reasonable strategic decision in view of the
4 fact the phone calls quite clearly involved drug dealing and the
5 implausibility of Smith's contention that he was, instead,
6 orchestrating the sale of pornography. Smith still could have
7 testified, if he had so desired, even after counsel made these
8 strategic arguments. Counsel's decision did not deprive Smith of
9 his right to testify.

10 In short, Smith has not established either deficient
11 performance or prejudice and therefore has not shown he is
12 entitled to relief on Ground Eight.

13 **G. Ground Nine**

14 Ground Nine asserts that counsel was ineffective for
15 failing to object to Smith being held accountable as a principal
16 because, Smith asserts, the indictment alleged only aiding and
17 abetting. Smith argues that no aiding and abetting jury
18 instruction was given as to Counts 2 and 3, suggesting that he
19 thus should not have been convicted under either count.⁴

20 Counsel was not ineffective for failing to raise what would
21 have been a meritless argument. *United States v. Moore*, 921 F.2d
22 207, 210 (9th Cir. 1990). Principal liability and aiding and
23 abetting liability are alternative theories of liability, and
24 the third superseding indictment alleged both theories. (See ECF

25
26 ⁴ The government's response to Ground Nine misconstrues Smith's
27 argument, focusing as it does on whether *aiding and abetting*
28 need to be alleged in an indictment. Smith's reply responds to
this argument. Because that is not how the court reads Smith's
claim, the court will not delve into the arguments raised in the
opposition and reply as to Ground Nine.

1 No. 660). Document #661 is not the indictment. It therefore
2 would have been frivolous for counsel to argue that principal
3 liability had not been alleged. For that reason, Smith has
4 demonstrated neither deficient performance nor prejudice, and he
5 is not entitled to relief on Ground Nine of the motion.

6 **H. Ground Ten**

7 In Ground Ten, Smith asserts his attorney was ineffective
8 for failing to move for dismissal on the grounds of lack of
9 jurisdiction. Although the claim is difficult to understand,
10 Smith appears to allege that the third superseding indictment
11 does not charge any federal crimes.⁵

12 This claim is plainly meritless. Each count in the
13 indictment charges a violation of federal law. The court
14 therefore had jurisdiction, and a motion to dismiss for lack of
15 jurisdiction would have been denied. Smith's counsel was neither
16 deficient nor caused Smith prejudice by failing to make such a
17 motion. Smith is not entitled to relief on Ground Ten.

18 **I. Ground Eleven**

19 In Ground Eleven, Smith asserts a claim of judicial bias
20 based on statements he alleges the court made when he sought
21 appointment of new counsel in July 2016 and April 2018.

22 Smith asserts that when he asked for new counsel in July
23 2016, the court responded: "I know how you people play the
24 system" and that Smith also said, "I have never fired anyone,
25 let alone a [sic] attorney, in my life." The transcript of the

26
27 ⁵ Smith's reply delves into several additional arguments that are
28 not part of his original claim and do not clearly connect to the
original claim. The court will not consider these contentions
raised for the first time in the reply.

1 July 2016 hearing does not include either statement, and instead
2 reflects the following exchange:

3 And at this point Ms. Field-Lang has reviewed all of
4 the material in this case at substantial cost. You
5 have court-appointed counsel, and that's
6 constitutionally provided for, and the Court respects
7 that. On the other hand, the Court doesn't like to
8 waste money and have somebody, you know, fully develop
9 and be prepared to go to trial on a case, and then at
10 the last second ask to be removed on the basis that
11 the defendant simply isn't happy with counsel's
12 performance or whatever the other reason may be. And,
13 frankly, there's some fairly substantial Ninth Circuit
14 law that does not permit withdrawal of counsel at this
15 late date, and certainly this is a very late date.

16

17 My major concern is that, number one, everybody had
18 scheduled the trial for next week. Number two, your
19 counsel, as I've indicated already, has devoted
20 considerable time to this case, and from an economic
21 standpoint, it simply means that another attorney is
22 going to have to work it up. I can almost tell you
23 without any reservation whatsoever that if I do go
24 ahead and appoint new counsel for you, that will be
25 the last time I do it except for extraordinary
26 circumstances. At that point I'll pretty much
27 determine probably that you're playing the system, and
28 I've been around on the bench long enough to see it
happen many times. So after the first change of
attorneys I get much more concerned about who's really
creating the problem, and you may just end up
representing yourself in the case if we keep going
down that path, and maybe that's what you want to do
right now, I don't know, I'll find out in a few
minutes.

(ECF No. 844 (Tr. 3-5)).

22 Recognizing that neither of the statements Smith alleges
23 were made appear anywhere in the official transcript, Smith
24 contends the transcript was altered. Smith's assertion is
25 without merit. The audio recording of the July 16, 2016, hearing
26 is consistent with the official transcript, and thus there is no
27 basis to the claim the transcript was altered.

1 Smith also alleges that during an April 11, 2018, hearing
2 on yet another motion to withdraw as counsel, the court
3 expressed that the case was costing a lot of money. As before,
4 Smith recognizes that this statement does not appear in the
5 official transcript but asserts the transcript must have been
6 altered. (See ECF No. 845). Again, the audio recording of the
7 April 11, 2018, hearing is consistent with the official
8 transcript, and Smith's factual allegation therefore lacks
9 merit.

10 Considering the statements that were actually made, which
11 appear on the official record, the court does not find evidence
12 of judicial bias that required disqualification or that violated
13 Smith's constitutional rights.

14 [O]pinions formed by the judge on the basis of facts
15 introduced or events occurring in the course of the .
16 . . proceedings[] do not constitute a basis for a bias
17 or partiality motion unless they display a deep-seated
18 favoritism or antagonism that would make fair judgment
19 impossible. Thus, judicial remarks during the course
20 of a trial that are critical or disapproving of, or
21 even hostile to, counsel, the parties, or their cases,
22 ordinarily do not support a bias or partiality
23 challenge. They may do so if they reveal an opinion
24 that derives from an extrajudicial source; and they
25 will do so if they reveal such a high degree of
favoritism or antagonism as to make fair judgment
impossible. . . . Not establishing bias or partiality,
however, are expressions of impatience,
dissatisfaction, annoyance, and even anger, that are
within the bounds of what imperfect men and women,
even after having been confirmed as federal judges,
sometimes display. A judge's ordinary efforts at
courtroom administration—even a stern and short-
tempered judge's ordinary efforts at courtroom
administration—remain immune.

26 *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). None of
27 the court's statements reflect a high degree of antagonism that
28 would make a fair ruling impossible. As the court previously

1 held when the defendant moved for recusal just before opening
2 statements:

3 [T]he Court has been quite fair in terms of your
4 requests for other counsel or your request of counsel
5 to be discharged from representation of you. Cost has
6 never been a factor, in my mind, in terms of whether
7 or not you should or should not have representation,
8 whether or not you should be appointed additional
9 counsel, or anything of that nature. The Court is well
10 aware of the circumstances that you have in connection
11 with appropriate representation. And the comments that
12 I made -- and I would have go back and look at the
13 transcript -- are related to comments that I would
14 make from time to time in other cases where there have
15 been a number of attorneys involved in the case. At
16 some point in time, the Court is concerned, not about
17 the economic part of it, but concerned about whether
18 or not the defendant is able, in any of those cases --
19 and perhaps to some degree in your case -- is able to
20 be able to get along with counsel well enough for
21 counsel, in the future, if there is a new attorney
22 appointed, to be able to fairly represent the
23 defendant. And at some point, a defendant may have to
24 represent himself if he's going to keep going through
25 attorneys. So to the degree that's a motion to
26 disqualify the Court, it's denied.

16 (ECF No. 830 (Tr. 18-19)). While the court did at one point
17 express concern about the economic costs of replacing counsel,
18 it was not of the costs associated with a single change of
19 counsel but of Smith's repeated replacements of counsel just
20 before trial, which suggested that perhaps Smith would not be
21 able to work with any attorney. Such concerns are not evidence
22 of judicial bias but instead were the court's caution to Smith
23 that he would not be entitled to indefinite replacements of
24 counsel. Smith's assertion that he was treated differently than
25 other defendants is conclusory and without a factual basis, and
26 he has not identified any similarly situated defendants who were
27 treated any differently than he was.

1 As it did before trial began, the court finds no evidence
2 of judicial bias that violated Smith's constitutional rights.
3 Accordingly, Smith has not established he is entitled to relief
4 on Ground Eleven.

5 J. Ground Twelve

6 In Ground Twelve, Smith asserts a claim based on alleged
7 newly discovered evidence suggesting that Rodriguez received
8 more benefits from the government than he admitted at trial. The
9 government argues that Smith's claim is not cognizable on habeas
10 absent a constitutional violation, and to the extent the court
11 were to consider it a motion for a new trial, the motion must be
12 denied.⁶

13 Citing several affidavits purportedly from Rodriguez's
14 fellow inmates, Smith contends that Rodriguez and Beard had an
15 overly friendly relationship with frequent interactions leading
16 up to the trial, and that Rodriguez received benefits that he
17 did not disclose to the jury, including: (1) Beard's phone
18 number and a promise that Beard would help Rodriguez's
19 girlfriend; (2) Beard and the government's help with Rodriguez's
20 detention; and (3) Beard's testimony on Rodriguez's behalf at
21 sentencing. Several of the inmate affidavits also state that
22 Rodriguez and Beard were seen visiting nearly daily, sometimes
23 for hours, and that Rodriguez received preferential treatment in
24 the jail. Finally, inmate Michael Jackson states that June 2017,
25 Rodriguez asked him if it was snitching to tell the authorities

26 ⁶ Again here, Smith's reply delves into several additional
27 arguments that are not part of his original claim and do not
28 clearly connect to the original claim. The court will not
consider these contentions raised for the first time in the
reply.

1 something that was not true if it would get him a better deal.
2 (ECF No. 935 at 46-48).

3 A claim alleging newly discovered evidence does not,
4 standing on its own, assert a constitutional violation amenable
5 to § 2255 relief. See *United States v. Berry*, 624 F.3d 1031,
6 1038 (9th Cir. 2010).

7 To the extent Smith is alleging actual innocence, the
8 Supreme Court has not yet recognized a freestanding claim of
9 actual innocence for which habeas relief may be granted. See,
10 e.g., *McQuiggin v. Perkins*, 569 U.S. 383 (2013). But “[a]ssuming
11 cognizability, the requisite showing on such a claim is
12 ‘extraordinarily high’ and must be ‘truly persuasive.’” *White v.*
13 *Russell*, 856 Fed. App’x 130, 131 (9th Cir. 2021) (unpublished
14 opinion) (citing *Herrera v. Collins*, 506 U.S. 390 (1993)), cert.
15 *denied sub nom. White v. Garrett*, 142 S. Ct. 1170 (2022). “At a
16 minimum, ‘to be entitled to relief, a habeas petitioner
17 asserting a freestanding actual innocence claim must go beyond
18 demonstrating doubt about his guilt, and must affirmatively
19 prove that he is probably innocent.’” *Id.*

20 The evidence offered by Smith falls far short of this
21 demanding standard, particularly in light of the compelling
22 evidence of his guilt introduced at trial. The evidence goes
23 only to Rodriguez’s credibility, which was challenged by defense
24 counsel at trial. This new evidence does not significantly
25 undermine Rodriguez’s credibility sufficient to persuade the
26 court that Smith is probably innocent. Therefore, to the extent
27 Smith asserts a claim of actual innocence, the claim is without
28 merit.

1 For the same reason, if Smith is seeking a new trial, that
2 motion would also be denied. A defendant seeking a new trial
3 must show, among other things, that "the evidence is not (a)
4 cumulative or (b) merely impeaching" and that "the evidence
5 indicates the defendant would probably be acquitted in a new
6 trial." *United States v. Wilkes*, 744 F.3d 1101, 1110 (9th Cir.
7 2014) (citing *United States v. Harrington*, 410 F.3d 598, 601
8 (9th Cir. 2005)). Not only does the evidence on which Smith
9 relies bear primarily on Rodriguez's credibility, much of the
10 evidence was in fact presented at trial. Defense counsel
11 highlighted the fact that Rodriguez did not mention Smith in his
12 first proffers, along with the evidence that Beard and Rodriguez
13 had a friendly relationship and frequently met. (ECF No. 830
14 (Tr. 39-40); ECF No. 831 (Tr. 157-61, 230-32). And as just
15 discussed, Smith has not established that he would probably be
16 acquitted in a new trial if this evidence were presented.
17 Accordingly, Smith has not met the requirements for a new trial,
18 and any such motion is denied.

19 Smith has not established he is entitled to relief on
20 Ground Twelve.

21 **IV. Motion for Evidentiary Hearing**

22 The court is not required to conduct a hearing on a § 2255
23 motion if "the motion and the files and records of the case
24 conclusively show that the prisoner is entitled to no relief."
25 28 U.S.C. § 2255(b). Because the motion and files and records of
26 this case conclusively show that Smith is not entitled to
27 relief, his request for an evidentiary hearing is denied.

V. Certificate of Appealability

In order to proceed with an appeal, Smith must receive a certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a defendant must make "a substantial showing of the denial of a constitutional right" to warrant a certificate of appealability. *Allen*, 435 F.3d at 951; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold inquiry, Smith has the burden of demonstrating that the issues are debatable among jurists of reason; that a court could resolve the issues differently; or that the questions are adequate to deserve encouragement to proceed further. *Id.*

The court has considered the issues raised by Smith, with respect to whether they satisfy the standard for issuance of a certificate of appealability, and determines that none meet that standard. Accordingly, Smith will be denied a certificate of appealability.

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1 **VI. Conclusion**

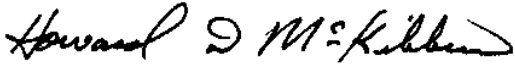
2 In accordance with the foregoing, IT IS THEREFORE ORDERED
3 that Smith's motion to vacate, correct or set aside (ECF No.
4 935) is DENIED.

5 IT IS FURTHER ORDERED that Smith is DENIED a certificate of
6 appealability.

7 The Clerk of Court shall enter final judgment and close
8 this case.

9 IT IS SO ORDERED.

10 DATED: This 6th day of June, 2022.

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13 UNITED STATES DISTRICT JUDGE
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